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No. 82-1078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

JAMES H. BROWN III - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO JURISDICTION

Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1). Respondent denies such assertion of jurisdiction, as Section 1254 applies only to cases in the courts of appeals of the United States. Petitioner is seeking review of an opinion of the Supreme Court of Kentucky.

Respondent further submits that the questions presented to this court neither specifically nor explicitly conform to Rule 17 of this Court. Furthermore, respondent submits that petitioner's question 1 was not presented to the Kentucky courts in the form or context presented here, and respondent also submits that

petitioner's question 2 does not involve a *novel* blood grouping technique; neither does it involve a timely request for continuance.

PREFACE TO COUNTERSTATEMENT OF THE CASE AND TO ARGUMENT

Petitioner Brown constantly has been in federal habeas corpus courts since October, 1977, in the aftermath of his 1976 conviction for murder in Kentucky's Mason Circuit Court.[1] At no time in that nearly 5½ year period has he ever claimed in any federal court—until now—that he suffered Constitutional deprivation at his 1976 state-court trial.

His attack heretofore has been only in regard to Constitutional deprivation on state appeal from that trial, not in his trial itself. Furthermore, he has refused to attack any part of that trial as Constitution-

[1]In *Brown* v. *Hinton*, No. 77-141, United States District Court for the Eastern District of Kentucky, at Covington; *Brown* v. *Smith*, No. 79-3589, United States Court of Appeals for the Sixth Circuit, decided *sub nomine* at *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010, at 1012 (6th Cir. 1980), and *Smith* v. *Brown*, cert. den. in this Court's case No. 80-1277, on March 18, 1981, two justices favoring certiorari. The United States District Court deliberately retained the action on its docket until Brown's petition for habeas corpus finally was dismissed by order of December 27, 1982, or after the pendency of this action in this Court. Petitioner's state appeal from the murder conviction was dismissed by the Supreme Court of Kentucky because of errors of appellate counsel in not timely filing the appeal, Memorandum of the United States District Court, No. 77-141, dated August 31, 1979. Federal courts ultimately found the dismissal of the appeal to be unconstitutional, and the Supreme Court of Kentucky reinstated the appeal. That court's affirmance of petitioner's trial conviction now is the basis of the petition for writ of certiorari.

ally defective in the context of persistent notice and mention by officers of the Commonwealth of Kentucky of this failure and refusal of petitioner to assert any available claims of trial error while in the various federal habeas corpus courts.

Thus, petitioner Brown's failure and refusal in federal court for nearly 5½ years was not because he did not think of the matter. Rather, it was a deliberate and knowing choice and decision not to attack his trial conviction in federal habeas corpus courts on Constitutional grounds. Now, for the first time, after nearly 5½ years of federal court litigation and an affirmance in the Supreme Court of Kentucky of Brown's trial conviction, petitioner most belatedly has decided it is now in his interest to make federal-court Constitutional claims about his state trial court conviction. Respondent Commonwealth of Kentucky sees no good reason to reward such deliberate delay. Respondent Commonwealth of Kentucky sees no reasonable justification for petitioner's refusal to raise all available Constitutional claims relative to his conviction while in the federal habeas corpus courts for more than five years.

COUNTERSTATEMENT OF THE CASE

Respondent does not accept the petitioner's statement of the case.

Petitioner Brown and his brother, Mark, were jointly indicted by the Mason County Grand Jury for

the murder, on May 19, 1976, of Bryant Victor Dudley[2] (TR 1).[3] Following jury trial, petitioner was convicted of the murder and received a penalty of 20 years of imprisonment.

Chan Warner testified that immediately before May 19, 1976, he saw petitioner and petitioner's brother, Mark. Mark said his house had been broken into, that drugs had been stolen, and that he knew who had done it and that Mark was going to get them. Mark was looking for the victim (TE 5).

Mark and petitioner were in petitioner's car (TE 6).

Steve Lofton testified that shortly before May 19, 1976, Mark told him, "Man, I have been ripped off, and when I find out who done it, I am going to blow their head off." (TE 8).

Robert Collins testified that Mark told him of the break-in (TE 10), and that Collins thereupon related he had seen the victim right beside his house during that time (TE 11). Mark told Collins $1,000 in drugs had been taken (TE 11). Petitioner was present when these things were told (TE 11).

Collins testified that later he was riding with petitioner, Mark and the victim when the two Browns questioned the victim about the break-in, with Mark doing most of the asking (TE 11-12). Mark had a .45

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[2]The appellate report of Mark's separate trial and conviction may be found at *Brown* v. *Commonwealth*, Ky., 555 S. W. 2d 252 (1977).

[3]Citations are to the transcript of record (TR) or transcript of evidence (TE) at the 1976 trial in Mason Circuit Court.

in his hand (TE 11), pointing the automatic pistol in the victim's direction (TE 12).

Collins asked to be taken back to his car, and he was (TE 12). The others were still together (TE 12).

Collins later learned that the victim was missing, and he and Mark went to Morton's Lane, Mark saying he wanted to look for the victim's body (TE 12). This was sometime in the night or morning (TE 12).

Collins and Mark looked for the body just off the side of the road, just up in the weeds (TE 13). The body was not found (TE 13). Mark told Collins that Mark could not remember where the body was, where they killed him (TE 13).

Collins bought marijuana from Mark (TE 13).

Collins testified that when he and Mark went to look for the victim's body, they took shovels to bury it (TE 16).

Collins testified that the .45 pistol he sold was not the same .45 which Mark had before the victim was shot (TE 18). Mark told him the first pistol was buried or gone (TE 17).

Anna Corde, the victim's girlfriend, testified that the victim told her he was going with petitioner and Mark the night of May 18, 1976 to their house (TE 19).

Ms. Corde testified that Mark came to her house to get the victim and that the victim told her he was going with Mark and petitioner (TE 19). The victim had stayed outside with Mark and petitioner about five minutes before leaving (TE 19). The victim was wearing a pair of cut-off jeans and a tee-shirt. Before

leaving, he put long jeans on over the cut-offs, and put on a pair of gym shoes (TE 19).

Steve Bowles testified that he saw petitioner, Mark, and the victim the night of May 18, 1976, at Mark's house between 11:30-12:00 (TE 21-22). Mark and the victim were high but petitioner was not (TE 22). These three were in the apartment when Bowles left (TE 23).

Craig Allen Burrows also testified that Mark, petitioner and the victim were together at this time (TE 26-27).

So did Mike Crawford, who testified that petitioner's condition was okay (TE 31-32).

William P. Lewis, a Kentucky State Police detective (TE 33), investigated Dudley's killing. A body was found in Morton Lane Road May 27, 1976 (TE 34). That body was the victim, Dudley (TE 34).

The body was across a fence, covered by weeds and briars (TE 34). Found at the scene were two wool socks, a paper towel with blood on it, a tireprint and two .45 caliber casings (TE 34). Gravel and dirt were collected near a bloody area (TE 39).

The body had a tee-shirt, and a pair of cut-offs down below the knees (TE 37). A pair of Levi's also was found at the base of a walnut tree (TE 38). Also found was a pair of tennis shoes (TE 38). These articles of clothing correspond with what Anna Corde said the victim was wearing when he left with petitioner (TE 19). A plaster cast of the tireprint which was found (TE 71) and tire markings showed that the

print could have been made by petitioner's car (TE 115).

The detective also obtained a 12-gauge shotgun belonging to petitioner from Robert Poe (TE 42-43). Shells in the gun, which was double-barreled, do not automatically eject when fired but stay in it until the gun is broken down (TE 43). A pump or automatic shotgun does eject shells (TE 43).

The detective also received three live and one spent shells from Mr. Poe (TE 44).

Detective Lewis' investigation led him to believe Dudley's death occurred on Morton Lane Road (TE 52).

During the trial, the trial court found that petitioner had examined the Commonwealth's files (TE 56).

Ralph Gramke, a Cincinnati policeman assigned to the coroner's office, testified that Dudley had been killed with a 12-gauge shotgun (TE 57).

Gramke testified that petitioner's shotgun was in firing order, but had a defective safety device (TE 59).

James A. Brell, Mason County Coroner, testified that the victim's body was badly decomposed when found May 27, 1976 (TE 70).

Jerry Conley testified that he was in jail with petitioner and Mark after they were arrested in connection with Dudley's death (TE 81). The three of them had a conversation concerning the victim and the trials (TE 81). Conley testified that Mark and petitioner offered Conley $1,000 to kill Robert Collins so he

wouldn't testify (TE 81). Mark made the verbal statement, and petitioner agreed with Mark (TE 81). Both petitioner and Mark were simultaneously present (TE 81). They wanted Robert Collins dead so he couldn't testify (TE 81). This occurred in July 1976, when Conley was in jail for public intoxication (TE 81-82). Conley testified that petitioner and Mark said their mother would pay him (TE 82). They also told Conley to use a gun (TE 83). Conley had been arrested for intoxication. However, that charge later was dismissed (TE 178-179).

Robert Poe was a family friend (TE 84). He received petitioner's shotgun from Christine Brown (TE 86). She is petitioner's mother (TE 88). Under questioning by petitioner's attorney, Mrs. Brown said she was not attempting to hide the gun from lawful authority (TE 93).

David Kearns, who lived at Lexington, testified that petitioner and Mark appeared at his apartment on the morning of May 19, 1976, arriving at about 3:00 or 3:30 (TE 98). They came in petitioner's car (TE 97). Petitioner had stayed there before, but Mark never had (TE 99). Petitioner usually arrived at around 7:00 p.m. when he came previously (TE 99).

David Wise, who lived in Lexington, testified that Mark, on that occasion, later went outside and a loud blast that sounded like a gun was heard. When Mark returned, he said he was checking the safety on a gun and that it went off (TE 101).

Roy Hutchinson, who lived in Lexington, testified that on May 19, 1976 (later on the day of the murder),

petitioner asked him if he wanted to buy a pair of boots (TE 106). Hutchinson had no money to buy boots, and petitioner told Hutchinson, "if I had a pair of boots or shoes or something that he would trade me." (TE 106).

So, they traded boots (TE 106).

Petitioner had a shirt with a hole toward the bottom and he asked for a shirt to wear, which Hutchinson provided (TE 107). Photographic exhibits of the murder scene show a barbed wire fence (photos are in back of state TE Volume 2).

Upon learning of Dudley's death and hearing rumors, Hutchinson noticed a stain on the boots petitioner traded to him (TE 107). He had never worn the boots except to try them on and they had stayed in his closet (TE 107). He gave the boots to Jerry Muse (TE 108).

William Schrand, a criminalist with the Hamilton County Coroner's Office, testified that he found human bloodstains on both boots (TE 112). He saw the boots at an earlier trial in Mason Circuit Court (TE 112).

Schrand testified that he examined a plaster cast and four tires and found one element on the cast that could have been produced by the tires (TE 114-115).

Dr. Paul N. Jolly, chief deputy coroner of Hamilton County, testified Dudley's body was markedly decomposed (TE 117). The back of the body had two shotgun entrance wounds (TE 118). Because of decomposition, their exact size could not be determined precisely (TE 118). This was the cause of death (TE 118). Dr. Jolly said death could have occurred as

recently as seven days prior to his examination, but probably a little longer (TE 119). He examined the body on May 28, 1976 (TE 117). The wound in the body would cause significant external blood loss (TE 120).

Jerry Muse, a Maysville policeman, testified that he obtained the boots exhibited in court from Roy Hutchinson's apartment in Lexington (TE 121).

William Lewis testified the four car tires came from petitioner's car (TE 126).

Robert Charles Shaler, examined out of the jury's presence (TE 128), testified that his tests of the evidence submitted to him are very similar to blood grouping tests, the difference being that the blood groups he uses are not commonly known to laymen (TE 129). Those groups, which he identified as Gm groups, are very stable in dry blood, and they occur in high concentration (TE 129). Shaler testified that "there are 23 different kinds of Gm groups. That is, 23 different kinds that we are able to analyze for routinely." However, he had available reagents to test for only three groups (TE 129). The test he made, known as an inhibition test, is a very common method for grouping blood (TE 129).

Shaler had testified only once previously—in a homicide case—about this method (TE 130). Shaler stated that while that homicide case is the first time the method was used in homicide cases, the particular tests are used routinely for paternity testing (TE 130).

Shaler, when asked by petitioner's trial attorney whether there is anything published to show the va-

lidity of the test in the United States, answered yes, that he had given the name of the book by telephone to petitioner's counsel (TE 131).

Shaler testified that Gm grouping throughout the world is commonly accepted. All Shaler has done, he said, is to take what has been done and apply it to identification of dry blood (TE 131). The tests Shaler conducted simply indicated the presence or absence of certain Gm groups (TE 132). He said there is no linkage relationship between Type A blood and Gm grouping, and that is why it is valuable (TE 132).

England and France have used Gm testing for quite a while (TE 134). Shaler could not test the blood sample for racial type, because he did not have the needed agents when he did the testing (TE 157-158).

Petitioner's trial counsel told the court he spoke to Shaler by telephone two days earlier (TE 134).

The prosecutor told the court he received copies of Shaler's test only that morning and gave a copy to petitioner's trial counsel almost immediately (TE 135). The prosecutor also informed petitioner's trial counsel as soon as word from Shaler was received by telephone (TE 134). Shaler had initiated the tests only on Friday (TE 135).

Petitioner's trial counsel did not question admitting Shaler's tests into testimony, but his ability to cross-examine was placed at issue (TE 136).

Before the jury, Shaler testified he received the boots in evidence for examination, plus other clothing and blood drawn from petitioner (TE 137). He de-

scribed his procedure for differentiating blood samples by identifying genetic factors (TE 138).

His identity test was one that could be viably used on old blood stains even up to 22 years later (TE 139). Also, his test may be successfully used without the presence of a large blood stain (TE 139).

Shaler said much like a person is or is not blood group A, then he is or is not a particular Gm group (TE 140).

Shaler's tests showed that the blood on the boots in question could not have come from petitioner (TE 148). It is impossible, he added (TE 149). Shaler said the blood on the boots possibly could be the victim's (TE 149).

Shaler said the Gm system comes from the blood's serum, as opposed to its solid content (TE 151). The Gm test analyzed immunoglobins which are in very high concentration and thus the test is very sensitive (TE 151).

On cross-examination, Shaler stated he had given a copy of his unpublished article to petitioner's trial counsel (TE 153).

Though unpublished, the paper was presented at the American Academy of Forensic Sciences in February, 1976 (TE 153). The paper also has been reviewed by numerous forensic serologists, the F.B.I., Scotland Yard, and has been accepted by them for publication (TE 153).

Shaler acknowledged that statistical/population blood sample studies would be more accurate if they could be sampled for each specific geographical area

of population. However, general studies of population blood sample frequencies are accurate to two percentage points (TE 155).

Shaler also testified that all he was doing was narrowing down the number of people whose blood the sample could be (TE 160).

Shaler testified he could not say the blood on the boots was the victim's (TE 161).

Shaler was a biochemist working in blood characteristics, as well as a forensic serologist (TE 165).

On redirect examination, Shaler testified that the Gm factor test is very much used in non-homicide cases in the United States (TE 165-166).

No objection was made to any part of the prosecutor's closing summation.

After going into deliberation, the jury returned and questioned the trial court (TE 203). The jury asked to hear the oath they swore as jurors and the oath they swore to be picked as jurors (TE 203). The oaths were read to them (TE 203).

Petitioner made no motion for continuance at the beginning of trial (TE "B"). Nor did he move for continuance at the beginning of the next day of trial (TE 93-94).

Petitioner's brother, Mark, did not testify.

ARGUMENT

1. The Question Presented Here Was Not Asserted at Trial or Upon Appeal. Its Belated Presentation Here Should be Rejected. Further, the Complained-About Blood Grouping System Is Not Novel, as Petitioner Asserts. It Is Medically and Scientifically Known and Accepted.

Petitioner urges this Court to find from the facts that the Gm blood grouping system used at his murder trial is "novel," that it is without scientific acceptance, that under such circumstances the respondent at trial had a duty to make a threshold showing of professional acceptance of the Gm system before relying upon it at trial, and that the blood grouping test was the principal support of his conviction.

As will be demonstrated, however, the Gm blood grouping system is not novel but well known, and in fact enjoys solid medical and scientific acceptance and reliance. More importantly, neither at Kentucky trial nor appeal did petitioner ever present the question he raises here as to any duty of threshold showing. The facts show much other support for conviction. And as noted in the preface, in more than five years of litigation in federal habeas corpus courts petitioner never raised any claim of any kind of Constitutional deprivation at his murder trial.

At trial, petitioner objected to Dr. Shaler's testimony on the ground that his tests were *unknown* (TE 128). At appeal, he argued that "there is no evidence *either* in the record *or* in the scientific community" that the Gm grouping used by Dr. Shaler is reliable.

Petitioner at trial did not challenge Dr. Shaler's credentials. Neither did he specifically challenge the bulk of Dr. Shaler's findings.

Finally, in urging this Court to embrace the test of *Frye* v. *United States,* 293 F. 2d 1013 (1923), and then apply it to this state case, petitioner concedes that "the *Frye* standard may not be constitutionally required." Petition at page 13.

Because of all this, respondent submits that this Court should reject petitioner's invitation. This Court has proclaimed its duty to dismiss a certiorari upon discovering that the question which induced issuance of the writ does not arise in the record of the trial court. *Tyrrell* v. *District of Columbia,* 243 U. S. 1, at 6 (1917). The omission being known earlier gives even greater reason to deny the petition.

All that the Gm blood grouping tests did, as a scientific and medical matter, was to parallel the same conclusion which would come to a reasonable man engaged in the use of common sense. That is, both processes tended to show that the blood in question on the boots was not petitioner's blood and that it could have been the victim's.

The common sense finding of this reality is as follows: Petitioner for no clearly articulated reason, almost immediately after the murder, arranged to trade his bloodstained boots for clean boots. There is no evidence showing bleeding by petitioner. There is no evidence showing bleeding by anyone except the murder victim. Simultaneously, petitioner also arranged to trade his torn shirt. The victim's body when

found was lying across a barbed wire fence. By common sense logic, petitioner was demonstrating knowledge that the blood on the boots was not his blood.

So either method of inquiry, without the other, excluded petitioner's blood on the boots, and pointed to the *possibility* that the blood on the boots was the victim's blood.

So the bloodstained boots, under either method of inquiry, simply tended to corroborate the other evidence of petitioner's whereabouts at the time of the murder.

Having said that, respondent will now cite medical and scientific evidence that the quarter-century-old Gm blood grouping system is highly reliable. Inasmuch as this authority concurs in every regard with Dr. Shaler's trial testimony, a further summary of Dr. Shaler's testimony at trial will first be set forth.

Shaler, a biochemist and forensic serologist, received his doctorate degree in biochemistry from Pennsylvania State University and received further graduate training in forensic science at the University of Pittsburgh. Thereafter, he was criminologist and research director at the Pittsburgh and Allegheny County Crime Laboratory. At time of trial, he was research assistant professor and assistant professor of forensic chemistry at the University of Pittsburgh (TE 136).

Dr. Shaler testified that he was asked to examine certain items to try and determine if the blood of either the victim or petitioner was on them (TE 138). His scientific intent was to use tests to identify genetic fac-

tors in blood which allow differentiation of samples of blood (TE 138). The tests work upon inherited properties in the blood, or antigens (TE 151). Both the victim and petitioner proved to have type A blood (TE 138). Shaler then was confronted with two realities. Could further distinction be made? Could it be made with the furnished blood samples? Usually, the age of blood is very important (TE 139). Since he didn't have fresh blood, he turned to the Gm system. The Gm system is good for very old blood—many years old, in fact. It occurs in high concentrations and thus the serologist needs very little blood for his sampling purposes (TE 139). And a person either has Gm, or he doesn't (TE 140). That is, there is no middle ground.

Gm factors are found in blood serum, and are very stable in dried blood (TE 129), and provide a very sensitive test (TE 151). There are 23 Gm groups which can be tested for routinely, Dr. Shaler testified (TE 129). Testing is known as inhibition testing (TE 129). Further, there is no relationship between A and Gm blood factors (TE 132). Here, he tested for three of those Gm groups (TE 140). Based upon his tests, he determined that the blood on petitioner's boots was not petitioner's—that was impossible (TE 148). That is, petitioner was excluded as having that particular blood grouping. (Shaler had been given a blood sample taken from petitioner).

On the other hand, the blood on the boots matched the blood on the victim's clothing. Therefore, the blood on the boots *possibly* was the victim's blood (TE 149).

The victim did not have Gm 12 blood; petitioner did (TE 148-150).

Dr. Shaler said Gm blood testing has been in use since the 1950s, particularly in other countries (TE 133, 152). Such testing is routinely done in paternity testing, he testified (TE 130). However, he personally was unaware of much prior use of it in homicide cases (TE 130, 156).

Dr. Shaler attributed its greater use in other countries to the relatively slow growth of forensic science in the United States (TE 134). Furthermore, the needed testing agents at time of trial had to be obtained in Europe (TE 150), and he had on hand the kinds to allow only the three Gm group tests.

Dr. Shaler stated that all the scientific-medical communities are trying to do is narrow down the possibilities, or to exclude, as to whose blood is involved (TE 160).

The literature endorses the Gm system's reliability and validity, and agrees in all regards with Dr. Shaler's testimonial accuracy.

In Vol. 2 of *Clinical Diagnosis and Management by Laboratory Methods,* 16th ed., by John Bernard Henry, M.D. (1979), we are told at p. 1519 that "of the many proteins present in the serum," the Gm genetic markers are one of the groups "most commonly tested" for paternity. Further, at p. 1526, "Testing genetic markers of immunoglobulins (Gm) is based on the principles of passive hemagglutination inhibition."

16 *Journal of Forensic Sciences,* by M. Blanc, R. Gortz and J. Ducos (1971) states:

> Many investigations have since confirmed the value of the Gm system for the examination of dried blood stains. The antigens are numerous, they are stable for years, and the test requires only a small amount of stain for very clear and specific inhibitions.
>
> * * *
>
> The tests for Gm antigens have yielded significant results for the identification of small stains and of old ones. In fact, these determinations have been applied several times in forensic medicine investigations, and the findings have proved decisive in some instances. (p. 176).

The Gm testing is so good for old blood, the Journal noted, that it easily allows postponement of the tests to await any possible new developments in the case.

> When a blood stain is found * * * it is usually advisable to postpone the test for Gm antigens and wait for developments in order not to use up a stain which might be needed later on. Because the Gm antigens are stable in dried blood stains, an analysis made later will be as reliable as one made on a fresher stain. (pp. 177-178).

The Journal concluded at p. 181:

> Tests for Gm antigens in dried blood stains should be made part of the routine practice in forensic medicine. The identification of Gm antigens is as reliable as that of many erythrocytic antigens, and the tests can be carried out on smaller stains. The tests increase the number of detectable characteristics and thus increase the precision of individual identifications * * *.

6 *Forensic Science* (1975), at pp. 89-90 discloses that Gm testing is so routine in Europe that authors Bozena Turowska and Franciszek Trela of the Institute of Forensic Medicine, Academy of Medicine, Cracow, even looked for and found Gm capability in the inner ears of cadavers. They found that if blood cannot be gotten from cadavers, then endolymph from the cadavers' inner ears is just as good for Gm testing purposes. No difficulties or anomolies were found.

11 *Forensic Science* (1978), at p. 109 reports that specified Gm groups can be determined in blood stains 29 to 33 years old, leading to the obvious conclusion that Gm is very stable in dried blood.

The authors, who were affiliated with a university laboratory in Belgium, happened to come across bloodstains dating from 1943 and 1947, and they tested them.

They concluded that an easy way to store blood samples for court uses, so that a report could still be drawn up years after the fact, simply would be to make a stain on a cotton tissue.

So routine does Gm testing appear to be elsewhere that in 11 *Forensic Science* (1978) at p. 41, two members of the Metropolitan Police Forensic Science Laboratory in London, reported that, in a real pinch, where there is insufficient material for separate and independent grouping, the same piece of bloodstained *thread* may be used for Gm or Km, *and* ABO group testing.

In 16 *Medicine, Science and the Law* (1976), three members of the same Scotland Yard laboratory conclude, at p. 43:

> In overall terms of sensitivity, durability and statistical significance, the Gm system is only surpassed by the ABO system.
>
> This is true, they stated, even though
>
> the Gm group system was first reported by Grubb and also by Grubb and Laurell in 1956. At that state only one antigen had been recognized * * *. Since then, the Gm system has been shown to be one of great complexity and a large number of antigens have been reported.

The authors stated that "Gm typing in relation to paternity is well established and has been in routine use for many years."

A reading of these authorities will show that much work has been done in other countries, and will impress that these matters are taken matter-of-factly and are reported in an apparently routine manner. Gm also will be seen as but one of a large and expanding number of blood grouping/typing tests.

In fact, Gm testing just for paternity had been done in at least 13-22 countries by 1974 or 1975, according to 9 *Family Law Quarterly*, pp. 615, 624 (1975).

In *Blood Grouping Test*, Sussman (1968) p. 116 and *Hereditary Gammaglobulin Groups in Man*, Ciba Foundation Symposium on the *Biochemistry of Human Genetics*, Grubb, R. (1959) p. 246 states that tests have corroborated the hereditary nature of the Gm property.

In 13 *Journal of Family Law* 713, which discusses blood test exclusion procedures in paternity cases, the Gm group is specifically recognized at page 749 as

dealing with serum protein blood factors. It is classed as a major blood group (p. 743).

The Journal of Family Law article concludes at pages 751-752 by stating that the Gm grouping test is one of a number of grouping systems that can presently be adopted for legal application.

The article was prepared with the assistance of specified medical authority. See footnote at page 713.

There is substantial agreement that blood grouping test results are admissible in evidence in criminal prosecutions on the question of whether particular blood was the blood of a specified individual. 46 A.L.R. 2d 1000, § 11 at p. 1025. This annotation is a discussion regarding blood grouping tests.

Thus, it is clear that authority supports the truth of Shaler's professional work, and supports the propriety of introducing Gm results in the present case. It is not new or unknown.

Shaler's own work, of course, had been examined and accepted by eminent law enforcement authority, including the F.B.I. and Scotland Yard (TE 153).

Petitioner tries to undermine Dr. Shaler by citing to Henneberg and Walter on the frequency of Gm^4 in Negroid blood. No matter what the frequency percentage of occurrence, of course, some people will have it and some will not. The frequency may vary from pure Negroid to mixed Negroid. However, petitioner stops short of calling Shaler wrong. And it must be recognized that Shaler at trial acknowledged that frequency sampling of the area of the crime, not else-

where, would be best (TE 155). The jury heard his testimony.

Thus, contrary to petitioner's claim that Gm is unknown and unreliable, there is abundant evidence both of record and within the scientific-medical community that the blood testing used is valid, reliable and accepted. Both Dr. Shaler and the scientific-medical community support each other as to the reliability and acceptance of Gm testing.

More to the point, these authorities corroborate the common sense analysis of petitioner's spontaneous and immediate trading of his bloodstained boots and torn shirt. Petitioner even without the Gm typing, knew his own blood was not on the boots. So knowing, he told the world this fact far more effectively than the Gm testing did. The conviction was proper. The petition here should be denied.

2. Petitioner Was Not Surprised at Trial by Dr. Shaler's Testimony. Neither Was the Gm Blood Grouping a Novel System. Further, Petitioner Delayed Until Almost the Last Minute to Seek a Continuance.

Petitioner claims that he was surprised *at trial* by Dr. Shaler's expert testimony regarding a *novel* blood grouping system.

As has been demonstrated, however, the Gm blood grouping system is not novel. Rather, it is well known, accepted and relied upon by both the medical and scientific communities.

Furthermore, Dr. Shaler's impending arrival was known to petitioner *before trial,* Dr. Shaler gave scien-

tific/medical references about Gm to petitioner *before trial,* and then petitioner waited until almost the end of the prosecution's case *at trial* to seek a continuance for the first time. Under such circumstances, the trial court acted properly within its discretion.

Petitioner's trial counsel knew of Dr. Shaler's writings in the Journal of Forensic Science (TE 131). Shaler had given counsel the name of a reference book by telephone (TE 131). Counsel had talked to Shaler by telephone before trial (TE 134). The prosecutor informed petitioner's counsel of Shaler's findings as quickly as they were known (TE 135).

While petitioner's trial counsel, after talking to Shaler, found that Shaler was then unwilling to testify because at that time his tests were ongoing and not conclusive (TE 135), the correct view is that had Shaler in fact been unwilling to testify, it would have been useless for him to give Gm references to petitioner's counsel by telephone before trial. Dr. Shaler testified *in chambers* that he gave such Gm references to counsel before trial, and this was not disputed (TE 131). Neither has petitioner ever alleged any sort of bad faith by the prosecution.

Given the great length of the *voir dire,* which is not reported in the record but which may be gathered from the prospective juror list at TR 86-90, it is apparent that petitioner could have sought a continuance before the jury was sworn and before even one witness had appeared. Yet no such motion can be found in the record. Instead, petitioner waited until the Commonwealth had presented almost all of its case before seek-

ing a continuance. Further, it appears that petitioner's passing comment here that failure to get a continuance denied him effective assistance of counsel also is a first-time claim in any court.

Under these circumstances, deference to the trial judge's discretion is appropriate, as petitioner's own authority, *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), states. The petition should be denied.

CONCLUSION

For the foregoing reasons and authority, respondent Commonwealth of Kentucky respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE AND PROOF OF SERVICE AND OF MAILING FOR FILING

I hereby certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari were served upon petitioner by depositing them in a United States mailbox facility with first-class postage prepaid, addressed to Mr. Kevin Michael McNally, Ms. M. Gail Robinson, Assistant Public Advocates, State Office Building Annex, Frankfort, Kentucky 40601, this 17 day of February, 1983. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of this Court, on the same date and by the same method.

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Counsel of Record for Respondent